UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 12-md-02409-WGY
Volume 2, Pages 89-167

In Re: NEXIUM (ESOMEPRAZOLE)
ANTITRUST LITIGATION

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For Jury Trial Before:
Judge William G. Young

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, November 4, 2014

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I N D E X

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
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P R O C E E D I N G S

(Whereupon the jury entered the courtroom at 11:19 a.m.)

THE CLERK: Court is back in session. You may be seated.

THE COURT: Go ahead, Mr. Sobol.

MR. SOBOL: Thank you, your Honor.

TIMOTHY HESTER, (Resumed)

DIRECT EXAMINATION, (Cont'd.)

BY MR. SOBOL:

Q. Mr. Hester, I believe that we were talking about certain events in April of 2008. Isn't it your recollection that once the Ranbaxy agreements were executed in the middle of April of 2008 that there was some effort to shortly thereafter, by AstraZeneca, settle with Teva?

A. I don't -- I don't remember it that way.

Q. Okay. So you don't have any knowledge about a meeting that occurred on May 1st, 2008? I think I went through that earlier this morning.

A. Yeah. With Teva?

Q. Yes, sir.

A. No. I don't remember that.

Q. Okay. You do have a recollection, however, that by July 2009, it's your testimony that there was an agreement in principle between AstraZeneca and Teva to

settle the Nexium case; correct?

A. That's right.

Q. And that it wasn't until late August that there was a separate discussion, in your view, regarding Prilosec; correct?

A. Right. By late August the parties had come up with a compromise number to settle the Prilosec litigation, and that was separate from this earlier discussion they'd had over the Nexium settlement.

Q. All right. And that occurred in the middle or late August of 2009; correct?

A. It might -- I mean, it's a while back, but my understanding or recollection is it was toward the end of August.

Q. Right.

A. There were discussions over the compromise settlement number for the Prilosec litigation.

Q. And so it's your testimony that the Nexium and Prilosec settlements were not joined earlier before that period of time?

A. That's right. And they weren't joined even then. The parties, my understanding was the parties were willing to settle each of them separately, but it made sense to look at whether they could settle them together. Because there were these two disputes, made sense to look at settling two

disputes.

Q. Well, in fact, sir, isn't it true that earlier that there were discussions regarding Prilosec in that the Nexium and Prilosec agreements were being drafted?

A. Well, the Prilosec, the idea of that possible settlement of Prilosec had been raised earlier. My point was that the parties hadn't come up with a compromise number until the later part of August.

Q. Your law firm provided a privilege log in this case; correct?

A. Right. I mean, I think we submitted one, yes.

Q. Right. And it was done under your supervision because you were the lead lawyer from your law firm; correct?

A. Yes.

Q. Right.

MR. SOBOL: Can I have GBM?

Q. I put before you GBM.

Does that appear to be an excerpt from the privilege log that your office provided in this litigation on or about April 5, 2013?

A. I'm really not sure. I mean, I don't think I've seen this before but -- so I really don't know what it is. But I know what privilege logs are, sure.

Q. Right. And do you know, is there a person who

works at your firm called, I think it's Gimblett or something like that?

A. Jonathan Gimblett, yes.

Q. He was one of the lawyers working under your supervision in this case; correct?

A. Yes.

Q. And don't you recall that he sent to us privilege logs regarding -- that were logging information that was not being provided because it was claimed to be attorney-client privileged in this case; correct?

A. I really don't know that. I wouldn't be surprised, but I don't know that.

MR. SOBOL: I offer GBM, your Honor.

THE COURT: No objection?

MR. BUTSWINKAS: Objection. Relevance.

THE COURT: May I see it?

THE WITNESS: Yes, your Honor.

(Handing.)

MR. BUTSWINKAS: It's also hearsay, your Honor.

THE COURT: Come to the sidebar.

SIDEBAR CONFERENCE, AS FOLLOWS:

THE COURT: Well, there's something to his relevance objection, only because there's so much of this stuff. Now, somewhere in here, because I recall what you've been doing, it says agreements, plural, and nothing is

pulled out. Do you need all of it?

MR. SOBOL: Just the first two pages, your Honor.

THE COURT: All right. So now we're down to the first two pages. And if I admit anything, it will be the first two pages.

So as to the hearsay objection, this is your authorized agent speaking in a lawsuit. It's not only an admission, it sounds like a judicial admission. It's not hearsay, it's an admission. Overruled.

(Whereupon the sidebar conference concluded.)

THE COURT: The first two pages of GBM will be admitted as Exhibit 98. And I excluded the rest of it simply because they don't have anything to do with anything. They're not hiding anything. First two pages are admitted, Exhibit 98.

(Exhibit 98 received in evidence.)

BY MR. SOBOL:

Q. So if you go to the first page of this exhibit, Mr. Hester, there are three entries at the bottom that are dated July 30th, 2009. Do you see that?

A. Yes, I do.

Q. Okay. And the custodian column, which is oriented far left, says that these came from your files; correct?

A. Yes. I think that's probably right.

Q. And the date of these entries is July 30th, 2009;

correct?

A. Right.

Q. And the first entry says, "Draft agreement prepared by counsel in connection with the negotiation of settlement of Prilosec patent litigation with Teva."

Do you see that?

A. Right. I see that. At that time we hadn't figured out whether the parties could come up with a compromise number, but I did work on a draft.

Q. Right. And so you were planning for the Prilosec settlement to occur at that period of time; correct?

A. No. We didn't know if the Prilosec case would settle. They had to negotiate a number first and we didn't know if they could.

Q. Sir, you were drafting the agreement on July 30th, 2009; correct?

A. I did -- I did a draft of the agreement, but you asked me if we were planning a settlement. We didn't know. It depended on whether the parties could negotiate a compromise of the damages number in the Prilosec case.

Q. Drop two items down from there, the bottom entry on this page.

A. Yes.

Q. July 30th, 2009, "Draft agreement prepared by counsel in connection with the negotiation of settlement of

Nexium patent litigation with Teva."

Did I read that correctly?

A. Yes, you did.

Q. So it's fair to say on the same day, July 30th, 2009, you were drafting both a Nexium settlement agreement and a Teva -- excuse me, a Prilosec settlement agreement; correct?

A. Right. And my point was that we had already agreed tentatively on what the entry date would be on the Nexium patent litigation and we did not yet have any number that the parties had negotiated on Prilosec. That's the only point I was making.

Q. But you knew enough to start drafting the agreement in July of 2009 -- correct? -- for Prilosec?

A. We knew the parties were thinking about the possible settlement of both. Both of these disputes were ready to be settled. So they were looking at both.

Q. And wasn't it basically a preordained conclusion, by the way, that both Mr. Pott and Mr. Egosi were going to be able to agree on some number later that month?

A. No, it was not preordained at all. We did not know. They had a separate set of negotiations in late August on what the number would be. We did not know what we did not know.

Q. It was preordained enough that you start drafting

the agreement, however; right, sir?

A. We knew there was a possibility they would settle, but it depended on whether they could come up with a number. This was a dispute that had been going on for years and they were trying to figure out if they could settle it. It's pretty standard that you try to settle cases like this if you can.

Q. Were you at any of the discussions that Mr. Pott and Mr. Egosi had over in England in the summer of 2009?

A. No, I was not.

MR. SOBOL: Well, can we come to the sidebar, your Honor?

THE COURT: We may.

SIDEBAR CONFERENCE, AS FOLLOWS:

MR. SOBOL: I think we have a little sword and shield here, your Honor. Obviously the witness is telling us that there's no agreement on the Prilosec number, but he knows that there's agreement on the entry date on Nexium, and the source for that information is Mr. Pott.

THE COURT: And so?

MR. SOBOL: And, accordingly, I am seeking a ruling that there's some sword-shield going on here and the defendant, AstraZeneca, is waiving for these discussions the contents of communications between this man and Mr. Pott.

THE COURT: Well, I haven't heard them asserted

yet. And so I won't rule yet.

(Whereupon the sidebar conference concluded.)

BY MR. SOBOL:

Q. Did you have any discussions in July of 2009 with Mr. Pott about the Nexium settlement with Teva?

A. I'm sure I did.

Q. What did he tell you?

A. I -- my memory is that he conveyed to me that we had an agreement on the date of the entry date and the basic terms of a Nexium settlement with Teva.

Q. Did he send you any documents in connection with that?

A. No. I think we were doing this by phone. And then they'd ask me to do the prepared -- prepare the draft agreements.

Q. Did he show you any documents of communications he, Mr. Pott, any communications he had with Mr. Egosi or were those all by the phone, too?

A. I -- I don't -- I don't remember. It's a while back. I don't remember him showing me any documents from Egosi. I think I was just talking to Jeff over the phone, to my memory.

Q. And what did Mr. Pott tell you about the possibility of a settlement on the Prilosec deal in July of 2009?

A. That this had been raised as an idea, and the question was whether there was a number that would be a fair compromise that the parties could negotiate. And we didn't have one yet. We didn't know if we could settle that case. It was coming later.

Q. Did he tell you anything else?

A. Not to my memory. I mean, I think that was basically the way we were discussing it at the time, that this was a dispute on Prilosec that had been going on for years. There was a single dispute over what the damages would be that Teva owed, how much money they owed to AZ. Pretty conventional. You try to settle a case like that if you can. But we didn't know if we could settle it.

Q. Did Mr. Pott tell you to start drafting the Prilosec settlement agreement in July of 2009?

A. Yes. I think the idea was have a draft ready if we can come up with a number. But the -- but we hadn't filled in the number. We didn't know what the number was. We didn't know if the parties would come up with a number that was one they could agree to on as a fair settlement of the case.

We knew Teva owed money to AstraZeneca, and there had to be a compromise, some sort of negotiation. That still was to come. So it hadn't happened yet. But, yes, we were thinking about the possibility of getting Prilosec

settled. It made sense.

Q. Well, Mr. Pott instructed you to draft a Prilosec settlement agreement in July of 2009; correct?

A. I think that's right.

Q. And he also at that time, in July 2009, instructed you to dust off or draft a settlement with Teva involving Nexium as well; correct?

A. Well, it was two separate settlements. But yes. There was an instruction to get a draft together on Nexium because we had a basic agreement on the terms on Nexium. We didn't have an agreement --

Q. Two separate settlements signed exactly the same day on January 6, 2010; correct?

A. We didn't have an agreement yet on Prilosec. We didn't -- hadn't worked out what the number would be or whether they could settle at all. We didn't know yet. But you get things ready. As a lawyer, one of the things I do is I work ahead and get things ready, so if you can settle you have it ready to go. That's what I was doing.

Q. Shifting to a different topic, sir.

In this settlement, in the settlement with Ranbaxy, Ranbaxy was agreeing in April 2008 to wait six years for its entry date, with certain exceptions; correct?

A. Well, it wasn't waiting. It was getting early entry under AstraZeneca's patent that could have held it out

of the marketplace until 2018 or 2019. It wasn't a question of waiting.

Q. Wait a second, Mr. Hester. You went to a meeting in November 2007 with Mr. Pott; correct? Yes or no.

A. Did I go to a meeting with Mr. Pott? Yes, I did, in November --

Q. How many times at that meeting in November of 2007 did Mr. Pott ask for any date beyond May 27th, 2014? How many times did he ask for that?

A. No, we --

Q. How many times, sir?

MR. BUTSWINKAS: It's been asked and answered.

THE COURT: No, he may press it. If you understand the question you may answer it. It calls for yes or no. You may always say you don't remember or that you can't answer it yes or no. But the question is a straightforward one, how many times.

A. How many times. I don't -- the only date we proposed is May 27, 2014. I don't know how many times we uttered the date. I don't remember, like, how many times.

Q. There was no mention at all in November of 2007 about AstraZeneca asking for any date beyond May 27, 2014; correct? Yes or no.

A. There was no mention of it, but it was an understanding that it was early entry.

Q. Was there any mention at all at any point after November 2007 by you or Mr. Pott that you were demanding a date, an entry date beyond May 27, 2014, ever?

A. We said if they -- if we settled the litigation, we would give them the licensed entry date early under their patents. But I also told --

Q. Did you mention a later date, sir?

MR. BUTSWINKAS: Can he finish his answer?

THE COURT: Wait a minute. You'll have a chance to inquire.

MR. SOBOL: Thank you, your Honor.

THE COURT: Go ahead.

Q. Did you ever mention any date later than May 27th, 2014, in any of your conversations?

A. Yes, we did. I told Ranbaxy that if they were not prepared to settle the case on the terms we proposed, we would go ahead and litigate the case and win and keep them out until 2018. I told them that.

Q. I see. When did you tell them that, Mr. Hester?

A. During the negotiations over the consent judgment when we were talking about whether this would be a court order. And I told Ranbaxy, If you're not prepared to settle the case with a court order that we can enforce, we are going to continue to litigate the case and we will win and hold you out until later. That --

Q. A comment, by the way, did you ever testify to that effect at all during your deposition in this case, sir?

A. I wasn't asked the question.

Q. I see. Now, in any event, if -- Ranbaxy, there was an agreement, an entry date of May 27, 2014, with exceptions; correct? Yes or no.

A. That's right. That's correct.

Q. Okay. And the exceptions were recognizing the fact that under the Hatch-Waxman scheme later generic companies, like Teva or somebody else, some later generic company might press the litigation and win that all the patents are either invalid or not infringed or some combination thereof; correct? There was that possibility?

A. What was your question?

Q. The question is, aren't you aware that the reason for some of the exceptions was that there was a possibility that, under the Hatch-Waxman scheme, that a later generic could get a victory on the patents regarding whether they were all -- whether they were invalid or infringed, all of them?

A. Well, you call it a scheme. It's a federal law.

Q. Fair enough.

A. Well, it's a pretty important difference. It's not a scheme. It's a federal law that gives Ranbaxy a set of rights and an exclusivity right that if a later generic

prevails in the patent litigation, then under the Hatch-Waxman law, federal law, there are rights to enter earlier. That's the way it works. And so the settlement reflected that.

Q. You can just use the term under "the Hatch-Waxman scheme"; right?

A. Well, I wouldn't call it a scheme. I would call it a federal law. But I don't know, maybe you call it a scheme.

Q. Well, let's call it -- use your words. So under the federal law --

A. Right.

Q. Right? It's possible, it provides the ability of a later generic to come up with a different way of making the product, to work around some patents under some circumstances, and get to market earlier? That's a possibility; correct? Yes or no.

A. It's not quite that simple. The later filing generic has to win in Federal District Court patent litigation, has to then win on appeal, and if it does both of those things on all of the patents, which is often a high hurdle, then it's allowed to -- then it triggers the exclusivity period of that first filer. But there's a lot of process. There's a lot of things that have to happen in federal court before that happens.

Q. Sure. Right. And then if, for instance, the later generic has figured out a different way to make the product such that they don't infringe -- right? -- then they get to trigger the first filer's exclusivity; correct?

A. Well, it's a little more complicated than that.

Q. Right. All right.

A. But you have to prevail in court.

Q. Sure. A court has to have a ruling; right?

A. So it's not just figuring it out, you have an idea but you have to win in federal court.

Q. Sure. And then they win in federal court, they win on appeal, they trigger the exclusivity of the first filer. If the first filer can't launch in 75 days, the first filer forfeits; right?

A. That's right. That's the basic way that the statute works. It gives right to the first filer that get triggered then by the later litigation. That can happen.

Q. Right. And if the first filer isn't able then to launch -- right? -- the 75 days goes by, they forfeit, and the later generic enterer -- the later generic enters the market. As a practical matter, that later generic is going to have some de facto exclusivity, some period of time during which they're on the market as the only ANDA-approved generic; correct?

A. No, that's not right. Because it depends on how

many later filers there are in the market. You can have a lot of later filers in the market, and once one of the later filers wins on the patents, they can all commit. So you can have a whole bunch of generics come in. So it's not at all clear that that would be that kind of exclusivity.

Q. Sure. Well, that's because you're talking about two different situations. By the way, I should go here. What these red arrows show, Mr. Hester, is that under the circumstances we just talked about where a later generic goes to court, wins in the district court, wins on appeal, gets a judgment that all of the patents are either not valid or and/or not infringed, that that later filer might be able to come on to the market in a point in time earlier than May 27, 2014. Do you have that in mind?

A. Yes, I have it in mind. The May 27, 2014, was a licensed entry date. They would have some rights to come in before the expiration of all of the AstraZeneca patents if they prevailed in the litigation.

Q. Right.

A. But that's a later date. The AstraZeneca patents ran out 2018 and 2019. So this is -- the May 27, 2014, date is the early entry that AstraZeneca gave under the license agreements. But the generic challengers were challenging patents that run out to 2018 and 2019.

Q. Sure. And they're trying to come on to the market

earlier; correct?

A. Earlier than what?

Q. Well, earlier than any date starting May 27, 2014, or going out?

A. No. They're trying to come on earlier than the end date of all the patents. So you've got a generic that's looking at all of those patents that run out to 2018, 2019, it brings that challenge to see if they can defeat those patents and come into the market sometime before the end of those patents. That's the way --

Q. Mr. Hester, are you aware that Mr. Pott offered the May 27, 2014, entry date to Teva back in 2008?

A. I thought it was discussed earlier before Judge Pisano even in 2007. I think he may have -- he may have mentioned that date in that initial conference before Judge Pisano to discuss settling the cases.

Q. For Teva?

A. But Teva didn't agree.

Q. Fair enough.

A. Because they were going ahead to try and litigate the cases.

Q. Okay. So from Teva's point of view, Teva was trying, even though it was offered May 27, 2014, it wanted to -- sorry -- it wanted to come on to market earlier than that; correct?

A. Well, the way --
Q. Yes or no?
A. No. It's not that -- no. You've got it wrong. Because if Teva lost the cases, they were going to stay out until 2018 and 2019. That was the risk Teva faced. They weren't going to get May 27, 2014, by litigation.
Q. Well, of course not. I'm talking about settlement, sir.
A. Their risk was they were going to be held out of market until 2018 or 2019. That was the risk Teva faced if they lost the patent case.
Q. Mr. Hester, you just testified that Mr. Pott might have offered May 27, 2014, to Teva as early as this Pisano status conference in 2007; correct?
A. He offered.
Q. Yes or no?
A. Yes. He offered it --
Q. Okay.
A. -- as a settlement.
Q. As a settlement. Fair enough. That's what we're talking about. And the settlement wasn't good enough to Teva at that point? This date wasn't good enough to Teva at that time; correct?
A. You've got it wrong. Because the question was we settle for May 27, 2014, or lose the patent case and end up

being held out until 2018, 2019. Those were the choices for Teva. They weren't going to get some earlier date from AstraZeneca. AstraZeneca never offered an earlier date to settle the cases. If they lost the cases, they were out to 2018, 2019.

Q. Mr. Hester, did Teva reject the offer by Mr. Pott of a May 27, 2014, entry date as a settlement?

A. They -- they didn't -- they didn't accept it when, when, when Mr. Pott proposed it, and they went ahead and litigated the case for years. And the cases didn't go well for them, to my understanding.

MR. SOBOL: Objection. Motion to strike, your Honor.

THE COURT: So much of the answer as begins, "the cases didn't," that's stricken. Disregard that.

Go ahead.

Q. Sometimes when a generic is able to enter, a later generic, not the first filer, but they go through and they get the district court ruling, and they get the appellate court ruling in their favor, sometimes the rulings are invalidity as to all the patents. That's at least theoretically the possibility; correct? Yes or no.

A. Right. Right. If you're challenging patents, one of the outcomes is you win on invalidity, you establish that all the patents were invalid. That's right.

Q. And when the generic establishes that all the patents are invalid, then that's the situation that you mentioned a few moments ago where all the generics might be able to come on to the market at some -- at an earlier point in time?

A. That's right. Because then the brand doesn't have any patent protection, and so others can enter the market.

Q. Okay. But sometimes a different result occurs, which is the later generic has -- its product is found not to infringe, meaning the way that that particular generic has gone about doing something avoids infringing one of the patents held by the brand company; correct?

A. It would have to avoid infringing all of them. But if it avoided infringing all of them, that's another way that they can come in earlier. But they have to beat them all.

Q. Okay. Or have some of them be invalid and then not infringe some of them?

A. That's right. That's another scenario. It can be a combination.

Q. Now, I'm going to be asking you a series of questions about this circumstance. Is it fair to call this a work-around generic, or is there some other word that we should give that kind of generic?

A. I don't know what you mean. You mean a generic,

what, that doesn't infringe?

Q. Yes. Just call it a noninfringing generic?

A. Yeah. I mean, I guess I would say noninfringing. I'm not sure I'd call it a work-around, but...

Q. Okay. Now, a noninfringing generic, if they are successful, and then the first filer can't, you know, they've triggered the first filer's exclusivity, the first filer can't launch for 75 days, a noninfringing generic then in that situation might have for some period of time a de facto exclusivity?

A. No. I think your question's wrong. Because the first filer's exclusivity begins running once there's a determination of noninfringement as to all the patents. So in that circumstance the first filer could launch.

Q. Right. So we have to wait just for 75 days to see if the first filer can do so; correct?

A. The first filer could still launch later, it just wouldn't have its exclusivity rights. But it would still have the ability to launch later.

Q. Sure. But we wait 75 days, if the first filer can't launch, the exclusivity no longer exists, and now the noninfringing generic's the only generic on the market able to go forward?

A. No, that's not right. Because you also have the first filer that also can be in the marketplace.

Q. But the hypothetical I'm giving you, sir, is that the first filer can't launch. For some reason it can't launch so it forfeits.

A. And -- okay. Well, I'm not sure I understand the hypothetical. But the normal, the normal situation would be if a second filer wins and triggers the exclusivity rights, under Hatch-Waxman, the first filer would also be in the market. So there's going to be at least two. But, typically, in a big product like this, with an important medicine, often more than two in the marketplace.

THE COURT: Just so we can follow this, when he -- they're both lawyers. When they talk about hypothetical, they're talking about an imaginary set of circumstances, and then applying the law to an imaginary set of circumstances what do they think would happen.

All right. Now, only one of them's testifying, and that's Mr. Hester. So you listen to what he says and figure out what you make about it. Now, you're not going to be asked anything like that. What you're going to be asked is what actually was going on here, and then to apply the law to what you determine was actually going on.

It's not inappropriate to raise a hypothetical to get an answer from a witness if we imagine that this was the situation, how would it work out.

Go ahead, Mr. Sobol.

Q. I placed the Ranbaxy settlement before you, Exhibit 10.
A. Yes.
Q. And if we go to the portion of the document that is page 10, Bates stamp on the bottom right-hand corner 014.
A. Right. I see that.
Q. And there's an Article 6, Covenants?
A. Yes.
Q. And the provision Article 6, Covenants, 6.1, "Ranbaxy for itself and its affiliates hereby covenants," and if you go to the next page, there's a (b)?
A. Right. I see that.
Q. And is that -- is it fair to say that that's the provision under which Ranbaxy is agreeing that it will not, until the entry date, launch a generic esomeprazole?
A. Right. This is a pretty standard provision you see in a settlement agreement where if you give somebody a license and they agree to respect your patent rights, you also have them agree that they won't launch before their license day. That's what this provision did.
Q. Now, if you go to up top on page 10, the section 5.2?
A. Right.
Q. Okay. And is it fair to say that all of section 5.2 is the definition in the settlement agreement regarding

what the entry date's going to be?

A. Yes, that's right.

Q. Okay. And then it starts out and it says, "For purposes of this settlement agreement the entry date shall be the earliest of," you see that? And then there are three things. (a) is May 27, 2014; correct?

A. That's right.

Q. Now, there is also a (b) and a (c); correct?

A. Right.

Q. And these are exceptions to the entry date; correct?

A. Well, they're not exceptions, they're part of the definition of the entry date.

Q. Okay. So these are dates upon which Ranbaxy might be able to enter earlier, i.e., the entry date might be accelerated?

A. Well, I mean, you've got it a little wrong. It's the license date. It's the -- these are the three ways that Ranbaxy would have a license to enter before the expiration of the patents.

Q. Okay. And so the license dates are, (a), (b), and (c)?

A. Right.

Q. And it's the earliest of (a), (b) and (c); correct?

A. That's right.

Q. Now, do you recall that in the November 2007 meeting that Mr. Pott wanted to make sure that the entry date permitted AstraZeneca to give the same licensed entry date to later generic companies?

A. It wasn't something we discussed, to my memory, at that November 2007 meeting. We certainly put it into the drafts after the meeting.

Q. Well, do you recall that Mr. Pott gave testimony before the FTC?

A. Yes, I do.

Q. Who was the lawyer that represented him?

A. I did.

Q. I put before you GBV.

Is GBV a photocopy of excerpts of the testimony before -- by Mr. Pott before the FTC at which you were representing him?

A. It's not the full transcript, right. These are just excerpts.

Q. Excerpts. It's not the full transcript?

A. Yes. I was representing him and there was a transcript. Yes.

MR. SOBOL: I offer it.

THE COURT: Any objection?

MR. BUTSWINKAS: Sidebar, your Honor?

THE COURT: We may.
SIDEBAR CONFERENCE, AS FOLLOWS:
THE COURT: You want the whole transcript?
MR. SOBOL: No, your Honor.
THE COURT: What do you want?
MR. SOBOL: I want these excerpts. This is not the whole transcript.
THE COURT: Oh, okay. These excerpts.
MR. BUTSWINKAS: My understanding is he's going to impeach Mr. Hester with someone else's testimony. That's not proper.
THE COURT: Well, he's offering it in evidence. And your objection is --
MR. BUTSWINKAS: Yes. My objection is -- let me explain how this came about. They had originally designated some testimony from Mr. Pott, and we had counter-designations for completeness. And they are, in a sense, trying to circumvent that process by introducing excerpts instead.
THE COURT: All right. So -- I'm not sure I go with the circumvent. They want a portion of his testimony, which is a prior statement under oath, and of course it is an admission as to AstraZeneca. Now, I could imagine that there might be materials, some other materials which you would offer for completeness, but I'm not hearing objection

to this, unless this is misleading.

MR. BUTSWINKAS: Your Honor, I got that last night and so for the first time --

THE COURT: I understand. I'll give you a chance.

MR. BUTSWINKAS: That's fair.

THE COURT: But I'll admit it subject to your coming up with completeness stuff.

MR. BUTSWINKAS: Thank you.

(Whereupon the sidebar conference concluded.)

THE COURT: GBV is admitted in evidence, Exhibit 99.

(Exhibit 99 received in evidence.)

BY MR. SOBOL:

Q. If you go to the page -- it's page 35 of the document. It has Bates stamp 351 in the bottom right-hand corner.

A. Right. I'm there.

Q. And, again, this is testimony of Mr. Pott that occurred in your presence; correct?

A. Right. I was the lawyer there representing him.

Q. Mr. Pott was talking about a meeting that both you and he had been at; correct?

A. Yes, I -- well, which one --

Q. This is the November 2007 meeting.

A. I maybe need to look. Are you referring me to

some specific question and answer? I may need to look at that.

Q. Yes, I will. Line 17, the FTC asked Mr. Pott:

"QUESTION: Do you recall what your counterproposal was?"

And answered, "Yeah, I countered with the entry date of May 27th, 2014. I told him that the license could be exclusive subject to an unlicensed entry and our right to give other companies a license of the same date. And, you know, we wanted it to be a consent judgment in place with admissions of validity infringement."

A. Right.

Q. Is that consistent with your recollection of the meeting that occurred on November -- in November of 2007 with Ranbaxy?

A. I mean, my -- it's a while back. It's six or seven years ago, but my -- I had a slightly different memory, but it gets to the same place because I sent a draft after this meeting with that proposal in it. So I can't remember specifically whether it came out the way Jeff described it here or the way I'm remembering, but it's close, either one. There's not a big gap.

Q. And do you recall that at that November 2007 meeting that there was discussion regarding Ranbaxy's exclusivity period and that -- but that there would be

exceptions to its exclusivity period?

A. I don't think we got into that level of detail. Ranbaxy had raised this general idea that they wanted us to respect their exclusivity period under Hatch-Waxman. We said we would consider that, and then we worked on the language that we sent back to them. I don't remember it being in that much detail.

Q. Okay. But do you recall, as a general matter, Mr. Pott indicated that, "I explained I wanted to be able to settle with other parties"?

A. I certainly recall that general idea that we needed to have the right to settle with other parties. It was an important medicine. We expected a number of challenges. We needed the ability to settle with other generic challengers to the patents, if that came about. And it did.

Q. And then do you recall that you were also at the meeting in January of 2005, correct? Excuse me, January of 2008; correct?

A. I'm with you on '08.

Q. Fair enough. You were at that meeting, Mr. Pott was there; correct?

A. That's right.

Q. And do you recall that there was again a discussion regarding the purposes of the exceptions to the

May 27, 2014, date?

A. Yes. I was -- I do recall that.

Q. Okay. And what do you recall telling -- did you -- what did you say to Ranbaxy, if anything, as to the reasons why AstraZeneca wanted these exclusions to the May 27, 2014, entry date?

A. I wouldn't really call them exclusions. They weren't exclusions. They were part of the definition of the entry date. But what we explained was that we needed the flexibility to license other generic filers for the same date or for a different date, and so we explained to them that if we get -- did that, and if we ended up giving anybody an earlier date, they would get that date too.

We didn't do that, but we needed the flexibility to decide what we were going to do in settling with later patent filers. So that was the discussion we had around that point.

Q. Okay. And do you recall that Mr. Pott explained to Ranbaxy that it's a lot easier to settle in the sense that you can give somebody the same date as opposed to being disadvantaged by another date?

A. I -- I recall that general discussion that it's tough to settle with second, third, fourth, fifth, sixth, filers if you say, And you're going to get a later date than other people we've licensed. It's hard to do that. It's

hard to give people a patent license and tell them they're getting a less good date than other people. It's hard to settle that way.

Q. And do you recall Mr. Pott also saying something to the effect that you have to be able to give other people the date, you have to -- I wanted to give other people the May 27, 2014, date?

A. Well, I remember it came up because Ranbaxy had proposed that there would be -- that we would license everybody for a later date, and we said we wouldn't do that. And we wanted the ability to choose which date we would license other people.

Q. So if we go back to Exhibit 10 then, the settlement agreement, and 5.2?

A. Right.

Q. Which is the bottom of 114 -- excuse me -- 014.

A. Yes.

MR. SOBOL: Can you put that back on the screen?

Q. So the second part of the licensed entry date, (b), states -- and this is, again, it means the earliest of; right? So first we had May 27, 2014, and then there's (b), "the date on which a third-party launches a generic esomeprazole product in the United States following a final court decision from which no appeal has been or can be taken holding that all claims of the AstraZeneca patents asserted

in that litigation are invalid, unenforceable, or not infringed by the generic esomeprazole product at issue in that litigation."

That's what the second part of this entry date definition states; correct?

A. That's right.

Q. And so if it turns out that there was some noninfringing generic that was going to be able to come on the market or trigger Ranbaxy's exclusivity, this agreement was permitting Ranbaxy to also come in the market earlier; correct?

A. Yeah. This is a really standard term in patent settlements.

MR. SOBOL: Your Honor, motion to strike.

THE COURT: The motion to strike's allowed. Disregard it.

Q. Stick to this, sir.

A. So the question is does this agreement provide that Ranbaxy would be able to launch in that circumstance?

Q. Yes.

A. That's right. It had -- but it wasn't just a noninfringing product, there had to be court decisions.

Q. Sure. Court decision, district court, circuit court, noninfringing, the noninfringing generic goes through all that work but now under this agreement AstraZeneca's

going to let Ranbaxy enter the market anyway; correct?

A. The -- that's --

Q. Yes or no?

A. Yes, because I -- well, yes. And we understood it was required by the law.

Q. Even though, by the way, that you were getting Ranbaxy to concede that its product infringed the patents, you were -- AstraZeneca was going to let Ranbaxy into the market earlier anyway?

A. Yes. That's -- that's the way this provision worked.

Q. Now, one -- well, let me ask this: How is it -- in what ways does having a provision like 5.2(b) in this settlement agreement, how does that help AstraZeneca in its goal to get later settlers to agree to the May 27, 2014, date?

A. It -- that was not a focus of this language. This language is in relation to settling the case with Ranbaxy. And the way to settle this patent litigation with Ranbaxy included that provision. It didn't have to do with the later filers.

Q. But I thought that Mr. Pott had indicated that he needed the exceptions to make it easier to settle with later generics?

A. No. The exception that related to licenses to

other generics was not (b), it was (c).

Q. Okay. Let's turn to (c).

A. It was not (b).

Q. All right. Then let's turn to (c).

MR. SOBOL: If you can highlight that, please.

Q. And, again, we're talking about the entry date meaning the earliest of, now we have (c): The date prior to May 27, 2014, on which any third party is authorized, under a license granted by AstraZeneca and KBI, to commence manufacturing, using, selling, offering to sell, importing, or distributing generic esomeprazole in and for the United States pursuant to an ANDA or an application pursuant to a citation, section 355(b)(2). That was the third portion of the entry date; correct?

A. That's right. Third part of the definition.

Q. And so under this definition, then, Ranbaxy was going to be able to enter earlier if for some reason AstraZeneca cut a deal with a later generic for that generic to enter earlier; correct?

A. That's right. If AstraZeneca gave somebody else an earlier license date, Ranbaxy would get it too. So that they wouldn't -- they wouldn't be disadvantaged.

Q. Now, without this provision, without 5.2(c), AstraZeneca could still go out and settle with a later generic for an earlier date; correct? Yes or no.

A. That's not the -- that's not the right point. The right point is 5.2(c) was necessary to settle with Ranbaxy.

Q. Well, I'm not talking about Ranbaxy right now. I'm not talking about Ranbaxy for a moment. If 5.2(c) was not in this agreement, AstraZeneca would have been able to go out and get an earlier entry date, cut a deal with somebody else for an earlier entry date than May 27, 2014; correct?

A. Right. 5.2(c) doesn't have to do with settlements with other parties, it has to do with settling with Ranbaxy.

Q. Okay.

A. That's right.

Q. And who suggested this provision first?

A. I -- I wrote this language and I suggested it in the drafts that I sent to Ranbaxy.

Q. Right. And you were representing AstraZeneca; correct?

A. That's right.

Q. Okay. And how is it, then, in what ways does having a provision like 5.2(c) in this settlement agreement help AstraZeneca in its goal of getting later generics to accept the May 27, 2014, date?

A. It doesn't have to do with settling related generics. It has to do with settling with Ranbaxy. 5.2(c) related to our ability to reach an agreement with Ranbaxy.

Q. So 5.2, by the way, (c), is one of those exceptions that didn't appear explicitly in the consent decree; correct?

A. It was cross-referenced by the reference to the settlement agreement.

Q. It was not explicitly in the consent decree though; correct?

A. In the final version of the court order, yes, it's not in there specifically.

Q. And it wasn't in the press release that AstraZeneca issued on that settlement; correct?

A. That's right.

Q. Okay. And was sharing with a generic, later generic -- well, strike that.

Isn't it true that one of the reasons that confidentiality agreement has these exceptions to share certain information with later generics, for AstraZeneca to be able to share with them, Hey, you know, we have this 5.2(c) that's going to let somebody else -- that's going to let Ranbaxy into the market earlier if you're able to cut an earlier deal with us?

A. No, that's not true. That's not the reason we had that provision on the confidentiality. It was a general idea related to the point that if you're settling with somebody later, they might want to know what was in the

other settlement agreements. It was not more than that.

Q. And well, isn't it the case, sir, that in later dealings with, for instance, Teva or other generic companies, AstraZeneca was permitted under these agreements to share with those later generics that, Look, if you are successful in getting an earlier entry date, we've already cut a deal, Ranbaxy's going to be allowed to enter then too?

A. It was -- it was something that AstraZeneca could do, but we never did.

Q. But you crafted the agreements to permit that to occur, didn't you, sir?

A. Wrote the agreements to preserve that flexibility, but we never used it.

Q. When Teva settled, Teva agreed to the May 27, 2014, entry date; correct?

A. That's right.

Q. And you gave Teva -- you structured that agreement in a way as to make sure that AstraZeneca would tell later generics, if it wanted to, that it had given Teva the right to come into market earlier if that later generic was able to cut an earlier entry date; correct?

A. That's not right. The language just said we had the ability to disclose the terms of other settlement agreements. We weren't focused on this 5.2 language. And, as I said, we didn't -- we didn't use that flexibility, we

just kept the flexibility.

Q. You structured the Teva agreement the same way you structured the Ranbaxy agreement with respect to 5.2(c) and the confidentiality agreement, didn't you?

A. Well, 5.2(c) in the Teva agreement is slightly different. The confidentiality concept in the Teva agreement is roughly the same as what's in the Ranbaxy agreement; gave us flexibility to share the agreement with others if we needed to but we didn't do it.

MR. SOBOL: GAP, please.

Q. Have you had any responsibilities for handling settlement agreements beyond those of Ranbaxy and Teva, but other generic companies that were seeking to get in the market for generic Nexium?

THE COURT: Could you ask the question again? I didn't --

MR. SOBOL: Sure. Sure.

Q. Have you had any responsibilities beyond the Ranbaxy and Teva situations for settlements involving generic companies seeking to get on the market for generic Nexium?

MR. BUTSWINKAS: Objection. Relevance.

THE COURT: Well, he may have a few questions. Overruled.

A. These were -- these were generics that were

challenging the AstraZeneca patents?

Q. Yes.

A. So it was patent litigation. And, yes, I was involved in working on settlements of other patent litigation beyond the Ranbaxy and the Teva litigations.

Q. One is settlements with Dr. Reddy's, Sandoz, Lupin, Hetero, Torrent?

A. Yes. I negotiated or worked on all of those.

Q. And --

MR. BUTSWINKAS: Your Honor, I misunderstood his question. I don't actually object to this line. So...

THE COURT: Okay. Go ahead, Mr. Sobol.

Q. I put before you a summary sheet that's been prepared, GAP.

Now, you haven't seen this document before; correct?

A. I haven't seen the document. I'm familiar, basically, with the subject.

Q. Okay. And the generic challengers or a series of generic companies that have filed ANDAs challenged AstraZeneca's Nexium patents; correct?

A. That's right. That's right. These were all part -- these were all generic companies that challenged AZ's patents on Nexium.

MR. SOBOL: I offer it, your Honor.

MR. BUTSWINKAS: No objection.
THE COURT: Again, the letters? Forgive me.
MR. SOBOL: GAP.
THE COURT: GAP is admitted, Exhibit 100.
(Exhibit 100 received in evidence.)
Q. Mr. Hester, you've given some testimony about the 180-day exclusivity period. You understand that that period can, of course, be forfeited by the first to file; correct?
A. Yes. A first filer can forfeit its Hatch-Waxman exclusivity. I know that.
Q. It can also selectively waive it under certain circumstances; correct? Yes or no.
A. Yes, it can, under certain circumstances.
Q. And it can relinquish that exclusivity under certain circumstances; correct?
A. Yes. I'm not totally sure what "relinquish" means in your question, but I think I can -- I understand basically what you're talking about.
Q. And as far as you understand they may; correct?
A. Yes. I mean, maybe you could explain what "relinquish" means.
Q. Give up?
A. I'm not sure that's different from waiving, but --
Q. Okay. Fair enough.
MR. SOBOL: Sidebar, your Honor, briefly.

THE COURT: You may.

SIDEBAR CONFERENCE, AS FOLLOWS:

MR. SOBOL: The Nexium purchaser would like a ruling from the Court that AstraZeneca has waived the attorney-client privilege with respect to communications between Mr. and -- Mr. Hester and Mr. Pott in the summer of 2009.

THE COURT: I'm not going to do it. They haven't -- I'm going to go question by question.

(Whereupon the sidebar conference concluded.)

MR. SOBOL: Nothing further, your Honor.

THE COURT: Mr. Butswinkas?

MR. BUTSWINKAS: Thank you, your Honor. Your Honor, what number did you mark Exhibit GAP as?

THE COURT: GAP is Exhibit 100.

MR. BUTSWINKAS: Andy, would you put Exhibit 100 up, please?

CROSS-EXAMINATION

BY MR. BUTSWINKAS:

Q. Good afternoon, Mr. Hester.

A. Good afternoon.

Q. You have Exhibit 100 before you, do you not?

A. Yes, I do.

Q. I just have a few questions about this chart.

MR. BUTSWINKAS: Thank you, Andrew.

Q. I want to ask you, all of the hypotheticals that the plaintiffs' counsel was asking you about, companies winning the patent litigation, getting in early, affecting the first filer, do you remember, generally, all those questions?

A. Yes. Yes, generally.

Q. In all of those hypotheticals would the generic company have to have FDA approval to come on the market?

A. Yes. FDA approval is required separate and apart from whether you win the patent litigation.

Q. And Exhibit 100, is that a list of the companies that have filed ANDAs with respect to generic Nexium?

A. Yes. So this is a list of companies that have filed patent challenges on the Nexium patents.

Q. And so in the left-hand column, that's the name of the company?

A. Yeah. Those are all generic companies that have brought challenges against the Nexium patents.

Q. Okay. And then the second column is "ANDA," and there are numbers under that. Do you know what that is?

A. Yeah, ANDA is short for an abbreviated new drug application, which is the number that the FDA assigns when a generic files a challenge to patents, as they did here.

Q. Okay. And then the next column is entitled, "Paragraph IV Notice." Do you see that?

A. Yes.
Q. Do you understand what that is?
A. Yes. That's a -- a notice that the generic has to give to AstraZeneca saying, in effect, Hey, I'm challenging your patents and here's a notice. It's called a Paragraph IV, but it's a notice that they're challenging the AstraZeneca patents.
Q. And this column reflects the dates of those notices?
A. That's right. That's the date that the notices were sent, and the law requires them to send it by certified mail on a certain day. So those are the dates that they -- those notices were sent.
Q. Okay. And then the next column is entitled, "30-Month Stay Expiry." Do you see that?
A. Yes.
Q. Do you know what that means?
A. Yes, I do. If AstraZeneca, within 45, days after it gets a Paragraph IV notice, files a patent suit against the generic, then there's a 30-month stay that goes into place. What that 30-month stay means is that's 30 months that the FDA is not allowed to grant approval. So the FDA cannot approve for that 30-month period. And so this column shows the days that that -- those 30-month periods ended.
Q. And the next column says, "Status." Do you see

that?

A. Yes.

Q. And the first two, Ranbaxy and Teva, are the generics in this case?

A. That's right.

Q. And then there are one, two, three, four, five other settlements. Do you see that?

A. One, two -- five. Yes, I see that.

Q. And they all have an agreed entry date?

A. That's right.

Q. And what are the agreed entry dates for those settlements?

A. For each of those settlements there was an agreement to a May 27, 2014, date. In other words, about four years early on the patents.

Q. And were you involved in these settlements?

A. Yes. I worked on all of these settlements.

Q. And you were involved in the Ranbaxy settlement?

A. Yes, I was.

Q. And the Teva settlement?

A. Yes, I was.

Q. And so that I can make this more efficient, in all your discussions and interactions with the counsel and parties representing the various generics in these that we've talked about here, have you ever offered a date

different than May 27, 2014?

A. No. That's always been the licensed entry date that we have offered in any of these settlements. It's the only one.

Q. And then underneath that there are -- there is N/A, N/A, N/A, N/A, N/A. Do you see that?

A. Right. So for six of them, I think, there's an N/A under agreed upon entry date.

Q. And are those for companies that AstraZeneca is currently in patent litigation defending these patents?

A. Right. So as to those six, patent litigation is ongoing and there's no settlement.

Q. Okay. I want to ask you to imagine another column on this chart. Okay?

A. All right.

Q. Actually, two other columns.

A. Okay.

Q. The first one is called, "Preliminary FDA Approval." Okay?

A. Right.

Q. Does Ranbaxy have preliminary FDA approval?

A. Yes, Ranbaxy does.

Q. So we'd have a "yes" there?

A. Right.

Q. How about Teva?

A. Teva does not have preliminary approval.
Q. How about Dr. Reddy's?
A. No, it does not have preliminary approval.
Q. Sandoz?
A. Does not have preliminary approval.
Q. Lupin?
A. Does not have preliminary approval.
Q. Hetero?
A. Does not have preliminary approval.
Q. Torrent?
A. Does not have preliminary approval.
Q. Mylan?
A. It does not have preliminary approval.
Q. Watson?
A. It does not have preliminary approval.
Q. Wockhardt?
A. It does not have preliminary approval.
Q. Aurobindo?
A. It does not have preliminary approval.
Q. Kremers?
A. It did not have preliminary approval.
Q. Zydus?
A. It does not have preliminary approval.
MR. BUTSWINKAS: You can take that down, Andrew.
Q. Do you have Exhibit 95 up there, Mr. Hester?

A. What is it?
Q. It was --
(Indicating.)
A. Oh, yes. I think I can find that.
THE COURT: It was the submission to the Federal Trade Commission.
MR. BUTSWINKAS: Thank you. Yes.
A. Yes. Yes, I have it. Yes.
Q. Do you remember, generally, that you were asked questions about the interrogatory answers that you said you prepared to submit to the Federal Trade Commission?
A. Yes, I remember that.
Q. And you were asked to look at, if my memory serves me correct, Interrogatory Number 6?
MR. BUTSWINKAS: Which is at the bottom of page 5, Andrew.
A. That's right.
Q. Okay. Do you remember that, those questions?
A. Yes, I do, generally.
Q. And do you remember being asked whether you bothered to provide the financial information related to Nexium to the Federal Trade Commission? Do you remember, generally, those questions?
A. Yes.
Q. Let me ask you to look at Interrogatory Number 9,

which is on page 8.

A. Yes.

Q. Can you just tell the jury what the Federal Trade Commission is asking there and what you supplied?

A. Well, the question was the sales for Prilosec and Plendil, and how we calculated those sales, how AstraZeneca calculated those sales. And we provided information on what those gross U.S. sales were.

Q. Did it also ask for the sales for Nexium?

A. Yes, it did, as well as -- you're right. Prilosec, Plendil and Nexium, asked for the sales figures for all three.

Q. And did you supply that information to the Federal Trade Commission?

A. Yes, we did.

Q. Let me ask you to look at Interrogatory Number 15, which is on page 12.

A. Yes.

Q. And if you could take a moment to review that, could you, again, tell the jury what the Federal Trade Commission was seeking there and what you provided?

A. So on Interrogatory 15, the FTC asked for information on sales for products that AZ sold to treat Gastroesophageal Reflux Disease, sort of the category of drugs used, like Nexium and others, used for that purpose.

And so we provided sales data, price data, cost data, marketing expenses, rebate information, and other details on the financials. So we submitted it, that kind of information, to the FTC.

Q. Thank you.

MR. BUTSWINKAS: Andrew, could you put Exhibit 100 back up?

Q. I said I was going to add two columns to this, Mr. Hester. And if the next column is, "Final FDA Approval," what do the answers look like?

A. Not one of these generics has received final FDA approval to launch a generic version of Nexium.

Q. And you were asked about -- you were asked a lot of questions where Mr. Sobol kept characterizing the entry date definition as exceptions.

Do you remember, generally, those questions?

A. Yes.

Q. And I'm going to use his word. Do any of those exceptions -- I'm going to put it in quotes, because I know you said it was part of the definitions, not exceptions -- do any of those exceptions provide for later entry as opposed to earlier entry in the market?

A. No. I mean, those provisions just allowed the entry date to move up, be earlier, in certain circumstances.

Q. I'm going to shift gears. How long have you been

practicing at Covington & Burling?

A. I've been there 31 years.

Q. And are you originally -- where are you based now?

A. Our offices are in Washington. That's where I am.

Q. And is that where you're originally from?

A. No. I grew up right around here. I was born in Boston and grew up in the western suburbs.

Q. And at a high level, you don't have to provide great detail, will you describe your path to Covington?

A. Yeah. So I grew up here, I went to college at Williams College, out in the far corner of the state, came back here and worked after college for several years, then went off to law school. I clerked for a federal judge. And then I went to Covington & Burling in the fall of 1983.

Q. And how would you describe your law firm?

A. Well, it's one of the largest and one of the oldest law firms in Washington. We represent many companies on matters involving issues with the federal government, and under complex areas of law, and that's really our specialty, are these areas of very complicated law.

Q. When did your firm open?

A. We opened in 1919. So we're almost 100 years old now.

Q. And I think you described in your answers to the plaintiffs' question what your general area of legal

expertise is, and would you just remind us of that?

A. So I've been practicing in the antitrust area for 31 years. Ever since I started at the firm that's been my area of specialty, sort of advising companies, and also litigation. That's what I've done.

Q. And do you have managerial responsibilities at your law firm?

A. Yes. I'm the chairman of our law firm. So I have, sort of, overall management responsibility for running our law firm.

Q. I want to turn to the questions that you were asked about the settlement negotiations with Teva. Okay?

A. Right.

Q. Did you draft the original settlement agreement between AstraZeneca and Teva for the Nexium patent case?

A. Yes, I did.

Q. And what was the license entry date going to be?

A. It was going to be May 27, 2014. That was the license date we put in there right at the start.

Q. And do you recall when you sent the first draft of the Nexium patent settlement to Teva?

A. Yes. I think it was in August, late August 2009.

Q. And were there negotiations over that draft after that date?

A. Yeah. We worked on the language and phrasing,

principally, and there were some negotiations over a couple of concepts that we worked through after -- after that August 2009 draft that I sent. We worked on it.

Q. And during that period, did you have exchange with the lawyers who were representing Teva in that negotiation?

A. Yes, I did.

Q. I think you have this up there, it's Exhibit Number 11. It's the Nexium settlement agreement.

A. I have it. Let's see if I can find it. Eleven?

Q. Yes. Here, I'll give you mine.

A. Sorry.

Q. That's all right. So the record's clear, do you have Trial Exhibit 11 in front of you, sir?

A. Yes, I do.

Q. What is that document, sir?

A. This is the final version of the settlement agreement that AstraZeneca entered into with Teva related to the Nexium patent litigation.

Q. And did you meet with Teva's outside lawyers to work through changes to this settlement agreement?

A. Yes, I did. I had, I think, one meeting with them in December of 2009.

Q. And were there changes to the first draft that you had circulated?

A. Yes, there were a number of changes we made.

Q. And did the licensed entry date of May 27, 2014, ever change?

A. No. That never changed. It never moved.

THE COURT: Just you use the word "outside lawyers." So the jury can follow, do you want to define for us an outside lawyer and an inside lawyer?

THE WITNESS: Yes, your Honor. So inside lawyers are people who are employed by companies, and outside lawyers are people who work in law firms and who represent companies.

THE COURT: So with respect to this, you're an outside lawyer?

THE WITNESS: That's right, your Honor.

THE COURT: You mentioned Mr. Pott. He's an inside lawyer for AstraZeneca?

THE WITNESS: That's right.

THE COURT: And you said you worked with the outside lawyers for Teva?

THE WITNESS: That's right. So I was working with lawyers from a law firm who were representing Teva in the negotiations.

THE COURT: Just so we're clear, do you remember the firm?

THE WITNESS: Yes. It was Goodwin Procter.

THE COURT: Thank you. Go ahead, Mr. Butswinkas.

MR. BUTSWINKAS: Thank you, your Honor.

Q. As this process played out, did you ever share any of the drafts of the Teva settlement agreement with any representative of Ranbaxy?

A. No, we never did.

Q. How about an outside lawyer representing Ranbaxy?

A. No, we never -- we never did. We never shared it with anybody from Ranbaxy or anybody representing Ranbaxy.

Q. And I have the same question with respect to these discussions. Did anyone from Ranbaxy ever partner in your settlement discussions with Teva and their representatives?

A. No. We never discussed any of the settlement agreement negotiations around Teva with Ranbaxy in any way.

Q. And in these negotiations, was there ever any horse trading over the entry date?

A. No. We never traded the entry date off against anything else. The entry date stayed where it was at that May 27, 2014, date.

Q. And were there -- we've talked about these parts of the entry date definition that could accelerate entry. Do you remember those questions, generally?

A. That's right.

Q. Were there discussions concerning events that could trigger an earlier entry date than May 27, 2014, with Teva representatives?

A. Yes. We did talk that through at some length with Teva.

Q. Can you give me a description of what you recall about any discussions on that topic?

A. Well, during our meeting with Staci Julie, I was at a meeting with her, I guess she was inside counsel, but with the outside lawyers as well. But I met with Staci Julie in December of 2009, and we had a long discussion about the fact that Teva needed to be in the market on the first day that it could possibly be in the market. And she told me that she would be fired if she didn't have the ability to get into the market if somebody else was in the market.

Q. And can you identify in the settlement agreement that you have, Exhibit 11, in front of you, the provisions that would allow Teva to come in earlier than May 27, 2014?

A. Yes. One of them was in section 5.2(c), which is on page 11.

MR. BUTSWINKAS: Would you put that up? Thank you very much.

Q. Okay. Will you read the language that you're referring to?

A. Yes. So that is one part of the definition of the entry date. And one of the parts of that definition was the date prior to May 27, 2014, on which any third-party

launches a generic esomeprazole product or an authorized generic, and under a license or other agreement with any of AstraZeneca, Merck, and KBI.

So, in other words, the point was if AstraZeneca licensed somebody for an earlier date, Teva said they had to have the ability to be in the market too. It was extremely important to them.

Q. Any other provisions?

A. Yeah. There were two others that are relevant here. One is in section 5.3, which is over on page 12. This is one of the provisions that we discussed at that December meeting. They said if you enter -- if you, AstraZeneca, enter into a license for an earlier date you have to tell us. You have to give us notice of that. And that was when Staci said to me, If I don't have the ability to be in the market day 1 when somebody else is in the market, I'll get fired.

Q. How is it negotiating with Ms. Julie?

A. She's pretty tough. She's -- you have to come prepared. And but it was a fair negotiation, but it was a hard negotiation. It was tough.

Q. Any other provisions?

A. Yeah. Then there was another one that was very important to them that they raised, and pushed us on, which was 5.4. This related to the situation where there could be

an unlicensed generic esomeprazole product. In other words, those earlier provisions were related to licenses that AZ might grant, but 5.4 related to a situation where there was an unlicensed product in the market. And, again, they said they had to have the ability to be in the market if there was an unlicensed product in the market.

Q. And do all of the provisions that you've just described provide circumstances for earlier entry or later entry than May 27, 2014?

A. All of these provisions I've just discussed would move the entry date earlier.

Q. Now, I asked you these questions one by one. I'll cover the other side.

During the course of your settlement negotiations with Teva, did AstraZeneca ever provided Teva with a copy of its settlement agreement with Ranbaxy?

A. No. We never -- we never did.

Q. And did you ever discuss the details of these settlement discussions with Teva with any of -- any other generic manufacturer who had filed an ANDA?

A. No. We never discussed any of the Teva negotiations with any other generic. We focused on Teva alone in our discussions. We never discussed with anybody else.

Q. Now, was there any agreement with Teva about

sending the settlement agreement to government agencies?

A. Yes. I mean, one of the provisions of the settlement agreement provided that the agreement had to be submitted to the Antitrust Division of the Justice Department, the United States Justice Department, and it also had to be submitted to the Federal Trade Commission.

Q. And is that a separate agreement or is that embodied in the settlement agreement itself?

A. It was one of the terms that we had in the agreement, that the agreement had to be submitted to the Antitrust Division of the Justice Department and to the Federal Trade Commission.

Q. Can you find that provision in the settlement agreement and point it out to the jury, please?

A. Yes.

Q. You're in Exhibit 11?

A. Yes. I'm sorry. Yes, this is Trial Exhibit 11. It's in Article 8, page 20. And you can see the heading there, "Notification of Settlement Agreement to the Federal Trade Commission and Department of Justice."

So that's the provision that required us, under our agreement, to submit.

Q. Can you read that section to the jury, please?

A. Yes. So section 8.1 said, "Within five business days following the signing date," so five days after this

agreement got signed, "the parties shall comply with the requirements of Title IX," so forth, of the law, "by filing or causing to be filed all necessary documents with the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice." So that was 8.1.

Q. Who originally inserted this provision in the settlement agreement?

A. This is language I had written and put into the agreement.

Q. Was it in your first draft?

A. Yes, it was. It was always in the draft.

Q. And did you send the Nexium patent settlement with Teva to the Antitrust Division of the United States Department of Justice?

A. Yes, we did. We submitted it to the Justice Department.

Q. And did you send the Prilosec settlement as well?

A. Yes. We submitted the Prilosec agreement as well to the Justice Department, and also to the Federal Trade Commission.

MR. BUTSWINKAS: I can't see here. Excuse me.

Q. I'm showing you what has been marked for identification purposes as Exhibit CC.

Do you have that in front of you, Mr. Hester?

A. Yes, I do.

Q. Can you identify that, please?
A. Yes. This is a letter that was sent under my signature to the Federal Trade Commission and to the Antitrust Division of the Department of Justice that enclosed the Nexium settlement agreement with Teva, and it also enclosed the Prilosec settlement agreement with Teva.
MR. BUTSWINKAS: I'd move that it be admitted, your Honor.
MR. SOBOL: No objection.
THE COURT: It may be received. CC is admitted in evidence, Exhibit 101.
(Exhibit 101 received in evidence.)
MR. BUTSWINKAS: Can you put that on the screen, just the signature block?
Q. This is the letter that you sent, Mr. Hester?
A. Yes. It was signed by Jonathan Gimblett for me. It was a letter that I had prepared, but then I wasn't there at the time to send it in.
Q. Remind us who Jonathan Gimblett is?
A. Jonathan Gimblett is a lawyer at my law firm who was working with me on this. And so he signed it on behalf of me because I wasn't there when we sent this in.
Q. I want to turn to the Prilosec settlement agreement now, for a minute. And did you draft that settlement agreement?

A. Yes, I did.
Q. And was it surprising to you -- well, let me just use the words of earlier questions.
Was it a coincidence that the Prilosec litigation and the Nexium patent litigation were being settled on parallel tracks?
MR. SOBOL: Objection.
THE COURT: No, he may have it in that form.
A. It was -- it was not a coincidence. We were working on both of them around the same time. We were seeking to settle two pieces of litigation. We were working on both of them. So when we got to the end, we signed them both on the same day.
Q. And do you have an understanding of when the earliest settlement discussions in the Prilosec case had happened between the parties, if you were involved?
A. It had been years earlier. There had been discussions over time, over years, over whether to settle the Prilosec case.
Q. In the interactions that you had with Ms. Julie and outside counsel for Teva during those months of exchanges in that big book, Exhibit 77, that you saw, I assume that there were some phone calls during that period?
A. Yes. There were a number of phone calls, and then exchange of documents back and forth.

Q. And at least one meeting?
A. Yes.
Q. And a lot of drafts?
A. Right.
Q. Okay. During that period of time, was there ever any mention by you of a discount in the Prilosec settlement in order to achieve the Nexium patent settlement?
MR. SOBOL: Objection.
THE COURT: Put the question again? Forgive me.
MR. BUTSWINKAS: Yes, your Honor.
Q. In that period of time during the negotiations where you actually participated, was there ever any mention by you of any kind of discount that was being given to Teva in the Prilosec litigation in order to settle the Nexium litigation?
MR. SOBOL: Objection.
THE COURT: Overruled. You may have it.
A. No. There was never any suggestion of giving a discount on Prilosec in order to get the Nexium case settled. And we viewed them as two separate settlements that stood on their own.
Q. Let me ask you on the other side the same question.
In those negotiations was there ever any mention by any Teva representative, whether inside Teva or outside

Teva, of a discount that they are receiving in the Prilosec litigation in order to settle the Nexium litigation?

A. Nobody ever suggested that to us at all.

Q. Have you ever used IMS data in negotiating patent damages settlements?

A. No. I don't use IMS data because they can be very inaccurate.

Q. I'm going to turn to the settlement negotiations with Ranbaxy.

A. Right.

Q. And you -- you've described a lot of that, so I'm going to be able to streamline some of the questions that I had for you.

But could you remind us when the first meeting you attended with Ranbaxy was?

A. The first meeting I attended was November 2007.

Q. Okay. And what was your role there?

A. Well, I was there to help with the negotiation of the settlement terms and with the preparation of the settlement agreement, if we were able to reach an agreement.

Q. And who else attended that meeting?

A. Jeff Pott was there, some other in-house folks from -- from AstraZeneca were there, maybe somebody else from my firm was there with me too.

Q. And how about from Ranbaxy?

A. Jay Deshmukh was there, there were some other people, in-house people from Ranbaxy there, and also their outside antitrust counsel, Lisa Fales, was there.

Q. So the counterpart to you?

A. Yes.

Q. And who was Jay Deshmukh, if I hopefully pronounced that right?

A. He was an in-house. I believe he's a lawyer. He was leading the negotiations for Ranbaxy in relation to the settlement.

Q. And during this meeting did AstraZeneca explain to Ranbaxy its rationale for the May 27, 2014, entry date?

A. Yes, we did. We said that those were the expiration dates on the medicine patents, the key medicine patents for Nexium, and that was the date that we'd be willing to use as the settlement allowing early entry on our patents, but respecting the expiration of those key medicine patents.

Q. And did AstraZeneca explain at this meeting why it wanted those terms in a consent judgment, which you've answered some questions about?

A. Yes, we did.

Q. What did you say?

A. And what we said was that we needed a court order that we were, in effect, getting a win in the patent

litigation with respect to the medicine patents, and we needed a court order to enforce the win we were getting through the settlement of the litigation in relation to validity infringement enforceability of the patents up through May 27, 2014. And we needed teeth to be able to enforce the settlement.

Q. And you testified earlier that Mr. Deshmukh had asked about the possibility of other commercial relationships. Do you remember, generally, those questions?

A. That's right. He said, generally, that he would hope that AstraZeneca would consider the possibility of other commercial arrangements with Ranbaxy.

Q. And when that was raised, did AstraZeneca respond?

A. Yes. We said we would consider it, but only if it made independent business sense as a stand-alone deal.

Q. And was there any response?

A. And then Lisa Fales, the outside antitrust counsel for Ranbaxy, responded and said she agreed that the business deals, commercial deals, had to make independent sense separate and apart from the settlement.

Q. And when was the next time you met, if at all, with regard to the Ranbaxy settlement after the November 2007 meeting?

A. It was in early January of 2008 -- 2008. I think it was January 4.

Q. And who attended that meeting?
A. I was there, Jeff Pott was there, I think there possibly were some other AZ in-house folks, maybe one other person from my firm.
Q. How about for Ranbaxy?
A. Mr. Deshmukh was there. There were some other in-house folks there from Ranbaxy. I think one of their outside lawyers was also there.
Q. Okay. And what had happened, if anything, in the negotiations leading up to that meeting after the November meeting?
A. Well, after the November meeting I had put together a draft of the settlement agreement which I sent along to the Ranbaxy team. We had then gotten comments back from Lisa Fales. Their outside antitrust counsel had sent these comments back. And then -- so that was what had happened before the January meeting.
Q. And when you got to the January meeting, who led the discussion?
A. I was principally leading the discussion over the language of the agreement.
Q. Okay. Were there any terms agreed to at that meeting?
A. Yeah. By the end of the meeting we had basically come to an agreement as to all of the terms.

Q. And what were they?

A. Well, the key terms were, first, that there would be early entry, four years early, under the AstraZeneca patents to allow Ranbaxy to be licensed as of May 2014, May 27, 2014. Ranbaxy agreed that the patents were valid, enforceable and infringed, and would respect AstraZeneca's patent rights. And that there would be a court order that would be submitted to the Court. And that the agreement, none of the terms of the agreement would go into effect without the court order.

And that was one of the things we discussed at length with them. And so that was another important term that was part of this agreement we had finalized, more or less finalized by the end of that January meeting.

Q. And did Ranbaxy agree at that meeting to have a court order?

A. Yes. We had some back-and-forth with Ranbaxy over that, but they did agree. And they agreed with our very important point that we stressed, that there had -- that the agreement would not take place and would not take effect unless there was a court order that gave enforceability to the settlement.

Q. And did you write the language of the agreement to reflect that point?

A. Yes, I did.

Q. Okay. And you were asked some questions about whether the settlement agreement was an agreement not to compete during Ranbaxy's period of exclusivity if they ended up getting one. Do you remember those, generally?

A. Yes, I do, generally.

Q. Okay. Was it?

A. It was not an agreement not to compete. We were careful in negotiating the language to preserve AZ's ability to compete. The only commitment we were making was that AZ would not launch an authorized generic. And we retained the ability to develop other products to compete very hard with the branded Nexium product, and to introduce an OTC product, as AstraZeneca did.

Q. What was discussed, if anything, at the -- this January meeting about the possibility of AstraZeneca licensing another company to the Nexium patents?

A. Didn't talk about it a bit. We were only talking about settling the Ranbaxy case.

Q. Let me show you what's already been marked as trial Exhibit Number 10.

(Whereupon counsel conferred.)

Q. Mr. Hester, do you have Exhibit 10 in front of you?

A. Yes, I have Trial Exhibit 10 here.

Q. Would you please identify that, for the record?

A. So this is the final version of the settlement agreement between AstraZeneca and Ranbaxy related to the Nexium patent litigation.

Q. And can you point out the section where the entry date is memorialized?

A. Yes. The entry date is set out in section 5.2 of the agreement, on page 10.

Q. I won't belabor that because you were asked questions about it before. You just testified about the provision in the agreement that said that if there was no order of the Court the agreement wouldn't take effect?

A. Yes.

Q. Can you cite that language?

A. Yes. So if you look at section 2.2, which carries over from page 5 to page 6 of the agreement.

MR. BUTSWINKAS: Thank you, Andrew.

A. Section 2.2 discusses this idea that the judge, the District Court Judge Pisano would be asked to enter the consent judgment. And then at the end of section 2.2 it says if after 30 calendar days from the filing of the consent judgment, in other words if after 30 days after the court order was submitted to Judge Pisano for him to review and sign, if the parties failed to secure entry of the consent judgment, in other words, if Judge Pisano didn't sign the consent judgment, didn't sign the court order, the

settlement agreement shall be null and void and shall have no legal effect.

That was the critical language, that the settlement agreement would be null and void and have no legal effect if Judge Pisano did not enter the court order, did not sign the court order.

Q. You were asked some questions about whether AstraZeneca tried to keep the settlement a secret. Do you remember, generally, those questions?

A. Yes.

Q. Did it?

A. No. We were not keeping it a secret. We intended all along it would be submitted and disclosed to the Federal Trade Commission, to the Antitrust Division of the Department of Justice, and to Judge Pisano. That was the intent of this provision with respect to Judge Pisano, that if he didn't sign the consent judgment, which was part of the settlement agreement, it wouldn't take effect. But we never intended to keep it a secret.

Q. But there's a confidentiality provision in the settlement agreement, Mr. Hester?

A. A confidentiality provision is a really standard thing you see in settlement agreements.

MR. SOBOL: Objection, your Honor.

THE COURT: Yes, sustained. That's not responsive

to the question.

Q. When's the last time you've done a settlement agreement in your career that didn't contain a confidentiality agreement?

MR. SOBOL: Objection.

THE COURT: No, he may answer that. Just when.

A. I've never done one without a confidentiality agreement.

Q. I want to show you Trial Exhibit 37, which I think you were asked some questions about.

(Whereupon counsel conferred.)

Q. Mr. Hester, do you have Exhibit 37 in front of you?

A. Yes, I do.

Q. And can you tell us what that is?

A. So this is the consent judgment, the court order, that Judge Pisano signed and that caused the settlement agreement to go into effect.

Q. Okay. And with respect to the -- what you've described as the core medicine patents, how does this order compare to what was being sought in the patent litigation?

A. The relief that's set out in this court order is the same relief that we would have gotten if we had won the patent litigation on the medicine patents.

Q. And were you involved from start to finish in the

drafting of the settlement agreements with Ranbaxy?

A. Yes. I was involved throughout in all of the drafting.

Q. Okay. And forgive me if I'm repeating myself, but did you ever send any of those drafts to anybody from Teva?

A. No, we never showed anybody any drafts of the Ranbaxy agreement, anybody else, never showed it to Teva or anybody else.

Q. And did anybody from Teva ever participate in any of those negotiations?

A. Nobody from Teva ever participated in any negotiations with Ranbaxy. We never discussed the Ranbaxy negotiations with them.

Q. You described how you personally sent the Prilosec settlement agreement and the Nexium settlement agreement with Teva to the Federal Trade Commission and the Antitrust Division of the Department of Justice.

A. That's --

Q. Did you do the same thing with Ranbaxy?

A. With the Ranbaxy agreement, the Nexium settlement agreement and all of the commercial arrangements that the parties had also entered into, I submitted all of those to the Federal Trade Commission and to the Antitrust Division of the Justice Department.

Q. Let me show you what's been marked as Exhibit CD

for identification.

Can you identify CD, Mr. Hester?

A. Yes. This is the document, the cover letter that I prepared and sent to the Federal Trade Commission and to the Antitrust Division of the Justice Department that enclosed the Nexium settlement agreement with Ranbaxy. And it also enclosed the other commercial deals as well.

MR. BUTSWINKAS: I'd ask that it be admitted.

MR. SOBOL: No objection.

THE COURT: No objection? No objection, CD's admitted, Exhibit 102.

(Exhibit 102 received in evidence.)

THE COURT: It's 1:00 and we'll stop at this point.

MR. BUTSWINKAS: Thank you, your Honor.

THE COURT: You may step down, sir.

THE WITNESS: Thank you, your Honor.

(Whereupon the witness stepped down.)

THE COURT: All right, ladies and gentlemen, we're moving right along. We'll start at 9:30 tomorrow and take a shorter recess, go to 1:00. You've not heard all the testimony. Please, therefore, keep your minds suspended. Do not discuss the case either among yourselves nor with anyone else.

The jury may stand in recess until 9:30 tomorrow

morning. I'll remain on the bench.

THE CLERK: All rise for the jury.

(Whereupon the jury left the courtroom at 1:00 p.m.)

THE COURT: Please be seated. Out of the 15 days available to both sides the plaintiff has used up six days, one hour; defense have used up three days, two hours.

We'll stand in recess till 9:30 tomorrow morning.

MR. SOBOL: If I may, your Honor?

THE COURT: Yes.

MR. SOBOL: I think it might help the parties if we can get a few minutes of your time this afternoon?

THE COURT: There's a court meeting this afternoon.

MR. SOBOL: Okay.

MR. SHADOWEN: Your Honor, can we hand up the McCool report showing --

THE COURT: I will be very much aided with that. Would you give it to the clerk?

MR. SCHOEN: Your Honor, I just, on that note, I point out the McCool report doesn't cite the document. It cites Dr. McGuire's report, so it doesn't cite the --

THE COURT: With respect, Mr. Schoen, I can read.

(Proceedings adjourned.)

C E R T I F I C A T E

I, Cheryl B. Palanchian, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

_____

CHERYL B. PALANCHIAN
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